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UNITED STATES DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

**Docket No. PHMSA-04-19173 (HM-223A)
RIN 2137-AE04**

**Applicability of the Hazardous Materials Regulations to a
“Person Who Offers” Hazardous Material for Transportation in Commerce**

Appeal of the

**American Chemistry Council
Chlorine Institute, Inc.
Dangerous Goods Advisory Council**

Come now the American Chemistry Council (“ACC”), the Chlorine Institute, Inc. (“CI”) and the Dangerous Goods Advisory Council (“DGAC”) (collectively “Petitioners”) and, pursuant to 49 C.F.R. 106.110, file this Appeal of the final rule published in this Docket on July 28, 2005 (70 F.R. 43638).

At the outset, Petitioners strongly agree with the need to define the term “person who offers” within the context on the Federal Hazmat Law generally and 49 C.F.R. 171.8, in particular. Petitioners also agree with the apparent intent of the new definition which would place responsibility as offerors on those who are required to perform various functions under the Hazardous Material Regulations (“HMR”). However, the final rule’s inclusion of the alternative definition that states an offeror is one who tenders a hazardous material to a carrier for transportation is certain to lead to confusion and quite possibly future litigation.

The initial definition, set forth as 49 C.F.R. 171.8 (1) (i), provides that an offeror is one who “performs, or is responsible for performing, any pre-transportation function

required under this subchapter for transportation of the hazardous material in commerce.” This definition is straightforward, and reflects the limitation of offeror responsibility that the regulated community had always assumed to be in place. The alternative definition, however, set forth as 49 C.F.R. 171.8 (1) (ii), removes the precision and clarity of the initial definition. The alternative definition that an offeror is one who “tenders or makes the hazardous material available to a carrier for transportation in commerce” simply defines offer with the synonym tender, and as such is of very little value. More importantly, however, following 171.8 (1) (i) which limits offeror responsibility to those who are required to perform certain functions under the HMR, the addition of the more general tender language must be read to expand the definition of offeror to those who are not required to perform such functions. Otherwise the tender definition would have no meaning, and it is axiomatic that regulations, like statutes, must be interpreted to give force to all of the language contained therein.

The concern expressed above is not mere speculation. In *In re New Orleans Train Car Leakage Fire Litigation*, No. 2000-CA- 0479, 2001, the Court of Appeal of Louisiana Fourth Circuit, relied upon the HMR to impose a non-delegable duty upon the owners of hazardous materials making them liable for the actions of shipper agent offerors. The Court relied upon the then applicable regulations regarding an offeror, and held that a consignee to whom title had passed was an offeror within the meaning of the HMR, and therefore liable for the actions of its shipper agent even though the shipper agent was clearly an independent contractor, and there was no claim of negligence in selecting the particular shipper agent.

The Louisiana Court determined that the owner of hazardous materials was an offeror even though it would not have met the definition of offeror contained in 171.8 (1) (i). In so doing it reasoned that the owner caused the hazardous material to be tendered to the carrier, and therefore was an offeror, and could not rely upon the actions of those who were properly hired to perform all transportation and “pre-transportation” functions. If that Court had been faced with the alternative definitions contained in the final rule, its decision to hold the owner responsible would have been much easier.

Limiting the definition of offeror to the provisions of 171.8 (1) (i) would do no damage to the clear intent of the final rule. Allowing the uncertainty created by 171.8 (1) (ii) to remain would do very real damage to the efficient and appropriate regulation of those who should be responsible for performing those functions mandated by the HMR. Therefore, Petitioners request PHMSA to modify the final rule identified above so that 171.8 would read as follows:

Person who offers or offeror means:

(1) Any person who performs, or is responsible for performing, and pre-transportation function required under this subchapter for transportation of the hazardous material in commerce.

(2) A carrier is not an offeror when it performs a function required by this subchapter as a condition of acceptance of a hazardous material for transportation in commerce (*e.g.*, reviewing shipping papers, examining packages to ensure that they are in conformance with this subchapter, or preparing shipping documentation for its own use) or when it transfers a hazardous material to another carrier for continued transportation in commerce without performing a pre-transportation function.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul M. Donovan". The signature is fluid and cursive, with a large initial "P" and "D".

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